FILE COPY

FILED
MAY 13 1950
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER, 1949, TERM

No. 752

FLOYD W. DUNAWAY, ALLIE MERLE DUNAWAY, joined by her husband, FLOYD W. DUNAWAY, MATTIE V. DUNAWAY, a feme sole, JOHNNIE FAY DUNAWAY SMITH, joined by her husband, CLARENCE R. SMITH, JULIA DUNAWAY IRICK, joined by her husband, J. T. IRICK, NELLIE DUNAWAY GROGAN, joined by her husband, GEORGE B. GROGAN, MAMIE DUNAWAY CUNDIFF, joined by her husband, E. J. CUNDIFF, MARY FRANCES DUNAWAY IRWIN, joined by her husband, EARL R. IRWIN, RUBY DUNAWAY WRIGHT, a feme sole, *Petitioners,*

v.

STANDARD OIL COMPANY (New Jersey), CITIES SERVICE COMPANY, NATURAL GAS PIPELINE COMPANY OF AMERICA, COLORADO INTERSTATE GAS COMPANY, SOUTHWESTERN DEVELOPMENT COMPANY, *Respondents.*

REPLY OF RESPONDENT SOUTHWESTERN DEVELOPMENT COMPANY TO PETITION FOR WRIT OF CERTIORARI

PAUL A. McDERMOTT,
Fort Worth, Texas.

WALES H. MADDEN,
Amarillo, Texas,
Attorneys for Respondent.

ADKINS, MADDEN, FOLLEY & ADKINS,
Of Counsel.

WARLICK LAW PRINTING CO., INC. — *Law Brief Printing* — Dallas — Harwood-9350

SUBJECT INDEX

	Page
Statement of the Case	2– 3
Argument of Respondent	3–12
Summary of the Argument	3– 4
Point 1: The Petition for Writ of Certiorari Does Not Comply with Section 2 of Rule 38 of the Supreme Court	4– 5
Point 2: The Petition Fails to Disclose Any Special and Important Reason for Granting the Writ	5
Point 3: The Orders Appealed from Were Not Final Orders and Not Appealable Under Sections 1291 and 1292 of Title 28 of the United States Code	5–12
Conclusion	12

Page

Arnold v. United States of America for the use of W. V. Guimarin & Co., 263 U. S. 427 ..... 8, 9, 10, 11
Barber Asphalt Paving Co. v. Standard Asphalt & Rubber Co., 275 U. S. 372 4
Cole v. Rustgard, 68 F. 2d 316 8
Furness, Withy & Co. v. Yang-Ztsze Ins. Assn., 242 U. S. 430 4
General Talking Pictures Corp. v. Western Electric Co., 304 U. S. 175 5
George T. Bishop Inc. v. Jones, 17 La. App. 410, 136 So. 101 11
Henderson v. Wadsworth, 115 U. S. 264 11
Hohorst v. Hamburg-American Packet Co., 148 U. S. 262 ..... 8, 9, 10, 11
Hunteman v. New Orleans Pub. Serv. Inc., et al., 119 F. 2d 465, cert. den. 314 U. S. 647 ..... 9, 11
Layne & Bowler Corp. v. Western Well Works, 261 U. S. 387 4
Mollie Tiger and Cumsey v. F. S. Lozier, 275 U. S. 496 5
Rusca & Cunningham v. Hammett (La. App.), 195 So. 642 11
Southern Power Co. v. North Carolina Public Service Co., 263 U. S. 508 ..... 4, 5
U. S. v. Rimer, 220 U. S. 547 5
Warren E. Brown v. Louis H. Kreitmeyer, 275 U. S. 496 5

Table of Statutes Cited

Sec. 225, Title 28, United States Code 11
Sec. 1291, Title 28, United States Code 4, 5, 11, 12
Sec. 1292, Title 28, United States Code 4, 5, 11, 12

Table of Supreme Court Rules Cited

Sec. 2, Rule 38, Supreme Court Rules 3
Sec. 5, Rule 38, Supreme Court Rules 5

Supreme Court of the United States
OCTOBER, 1949, TERM

No. 752

FLOYD W. DUNAWAY, ALLIE MERLE DUNAWAY, joined by her husband, FLOYD W. DUNAWAY, MATTIE V. DUNAWAY, a feme sole, JOHNNIE FAY DUNAWAY SMITH, joined by her husband, CLARENCE R. SMITH, JULIA DUNAWAY IRICK, joined by her husband, J. T. IRICK, NELLIE DUNAWAY GROGAN, joined by her husband, GEORGE B. GROGAN, MAMIE DUNAWAY CUNDIFF, joined by her husband, E. J. CUNDIFF, MARY FRANCES DUNAWAY IRWIN, joined by her husband, EARL R. IRWIN, RUBY DUNAWAY WRIGHT, a feme sole, *Petitioners*,

v.

STANDARD OIL COMPANY (New Jersey), CITIES SERVICE COMPANY, NATURAL GAS PIPELINE COMPANY OF AMERICA, COLORADO INTERSTATE GAS COMPANY, SOUTHWESTERN DEVELOPMENT COMPANY, *Respondents.*

REPLY OF RESPONDENT SOUTHWESTERN DEVELOPMENT COMPANY TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The Respondent Southwestern Development Company, for reply to the petition for writ of certiorari, shows the following:

I.

STATEMENT OF THE CASE

This is an action brought by petitioners in the United States District Court for the Northern District of Texas against this respondent and five other foreign corporations, namely, Standard Oil Company (New Jersey), Cities Service Company, Natural Gas Pipeline Company of America, Canadian River Gas Company, and Colorado Interstate Gas Company, of which only Canadian River Gas Company has a permit to do business in the State of Texas. Joint and several liability was alleged as against all six of the defendants for claimed breach of an implied covenant of an oil and gas lease to protect against drainage resulting from conspiracy under the Sherman and Clayton Acts, which drainage was alleged to have damaged petitioners in the sum of $920,000.00, and petitioners prayed judgment for thrice the amount of such damages and for court costs and reasonable attorneys' fees. (R. 33-34.)

Each of the defendants except Canadian River Gas Company filed a motion to quash the service, and each except Standard Oil Company (New Jersey) moved to dismiss the action for want of jurisdiction and venue. (R. 381.) Each of the motions to quash was sustained, the cause was dismissed as to each of the moving defendants (R. 381), and plaintiffs appealed from each of the orders. (R. 335-336.)

Respondent Southwestern Development Company filed its motion in the United States Court of Appeals for the

Fifth Circuit to dismiss the appeal on the ground that the order appealed from was not a final judgment. Thereafter, and on December 19, 1949, the United States Court of Appeals for the Fifth Circuit made and entered its judgment sustaining respondent's motion, and dismissed the appeal. (R. 381-383.) And petitioners are making this application for writ of certiorari to review this judgment.

II.

ARGUMENT

Summary of the Argument

The petition for writ of certiorari should be denied because:

1. The petition fails to comply with Section 2 of Rule 38 of the Supreme Court, in that the petition does not contain a summary and short statement of the matter involved, a statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment or decree in question, nor a statement of the considerations presented and the reasons relied on for the allowance of the writ;

2. The petition fails to disclose any special and important reasons for granting the writ; and

3. The appeal was properly dismissed because the orders of the United States District Court for the Northern District of Texas, from which the appeal was taken, were not final orders and therefore were not appealable under

Sections 1291 and 1292 of Title 28 of the United States Code.

Point 1

The petition for writ of certiorari should be denied because it fails to comply with Section 2 of Rule 38 of the Supreme Court, in that the petition does not contain a summary and short statement of the matter involved, a statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment in question, nor a statement of the considerations presented and the reasons relied on for the allowance of the writ.

The first part of Section 2 of Rule 38 of the Supreme Court provides that the petition shall contain a summary and short statement of the matter involved, a statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment in question and the reasons relied on for the allowance of the writ; and that a failure to comply with these requirements will be a sufficient reason for denying the petition. We submit that the petition for the writ (pages 2-33 of the petition) wholly fails to meet these requirements, and that a most casual reading of the petition evidences this fact. Accordingly, and for this reason, the petition for the writ should be denied.

Furness, Withy & Co. v. Yang-Ztsze Ins. Assn., 242 U. S. 430; Layne & Bowler Corp. v. Western Well Works, 261 U. S. 387; Southern Power Co. v. North Carolina Pub. Serv. Co., 263 U. S. 508; Barber Asphalt Paving Co. v.

Standard Asphalt & Rubber Co., 275 U. S. 372; Mollie Tiger and Cumsey v. F. S. Lozier, 275 U. S. 496; Warren E. Brown v. Louis H. Krietmeyer, 275 U. S. 496.

Point 2

The petition for writ of certiorari should be denied because the petition fails to disclose any special and important reason for granting the writ.

Section 5 of Rule 38 of the Supreme Court provides that a review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. Nowhere in the petition for the writ does there appear any special or important reason why this Court should review the judgment of the Court of Appeals for the Fifth Circuit. Accordingly, the petition for writ of certiorari should be denied. *U. S. v. Rimer, 220 U. S. 547; Southern Power Co. v. North Carolina Pub. Serv. Co., 263 U. S. 508,* and *General Talking Pictures Corp. v. Western Electric Co., 304 U. S. 175.*

Point 3

The petition for writ of certiorari should be denied for the reason that the appeal was properly dismissed because the orders of the United States District Court for the Northern District of Texas, from which the appeal was taken, were not final orders and therefore were not appealable under Sections 1291 and 1292 of Title 28 of the United States Code.

Petitioners sued for damages for breach of an implied covenant of an oil and gas lease to protect against drainage. (Paragraphs III, IV, V and VI of the Complaint, R. 5-9.) This lease was executed by the petitioners to Canadian River Gas Company, which company is a party to the suit. (R. 5.) Standard Oil Company (New Jersey), Cities Service Company, Natural Gas Pipeline Company of America, Colorado Interstate Gas Company and Southwestern Development Company were made parties on the theory that certain alleged contractual relationships between them and Canadian River Gas Company made them the real parties at interest and constituted a violation of the Sherman and Clayton Acts. (Paragraph I, R. 3; pars. VII-XVI inclusive, R. 10-32, of the Complaint.) Petitioners' contentions are summarized in the prayer of their complaint as follows:

"WHEREFORE, plaintiffs demand judgment:

"(1) That defendant lessee or lessees, ever since plaintiffs' wells were brought in, have failed to protect all of plaintiffs' leases from drainage of gas in continuous substantial amounts and in fact lessee or lessees (defendants) themselves being the ones that have siphoned from underneath plaintiffs' leases gas in a total amount of 26,300,000 M. C. F.

"(2) That the Canadian River Gas Company and the Colorado Interstate Gas Company and Southwestern Development Company are alter egos, instrumentalities of Standard Oil of New Jersey.

"(3) That Standard Oil Company of New Jersey and Cities Service are and have always been plaintiffs' lessees.

"(4) That Natural Gas Pipeline Company of America and the Public Service Company of Colorado

and Colorado-Wyoming Gas Company are alter egos and instrumentalities of Cities Service Company.

"(5) That the defendants, Standard Oil, Cities Service and Southwestern Development Company on April 5, 1927, entered into an unlawful conspiracy to monopolize the natural gas business in the ownership of a large natural gas reserve in the Panhandle district of Texas, to control its production, transportation and sale throughout the north central states, and to lessen competition, control prices and production in interstate commerce, all in violation of the anti-trust laws of the United States and of Texas and other states.

"(6) That the overt acts of the defendants in pursuance of their unlawful conspiracy resulted in financial damages to plaintiffs as herein before related in the sum of $920,000.00.

"(7) That judgment be awarded in favor of plaintiffs against each of the defendants, individually and jointly, for thrice the amount of such damages, and for court costs and reasonable attorney's fees." (R. pp. 33-34.)

Thus it appears that petitioners assert joint and several liability against all six of the corporate defendants, including Canadian River Gas Company. Upon proper motions, orders were entered quashing the service of process or dismissing all the defendants except Canadian River Gas Company. (R. 324-329.)

No appeal was taken by Canadian River Gas Company, which admits that it has been duly served with process and has been and still is licensed to do business in Texas.

From the above, we see that there is but one cause of action alleged, that being drainage resulting from the alleged conspiracy in violation of the Sherman and Clayton

Acts; and the alleged cause of action against several defendants jointly and severally liable not having been determined as to all of them, the orders dismissing as to part of them are not appealable under Sections 1291 and 1292 of Title 28 of the United States Code.

In this connection the courts have held in *Cole v. Rustgard, 68 F. 2d 316*, and *Shultz v. Manufacturers & Traders Trust Co., 103 F. 2d 771*, that except as otherwise provided by statute, the case may not be brought up on appeal in fragments, but judgments appealed from must be final and complete as to subject matter and as to parties.

Two of the leading cases which have been decided by this Court having to do with appeals from orders that are not final are *Hohorst v. Hamburg-American Packet Co., 148 U. S. 262*, and *Arnold v. United States of America for the use of W. V. Guimarin & Co., 263 U. S. 427*. The *Hohorst case* involved an action for joint and several liability resulting from patent infringement. A motion to dismiss the Hamburg Company for lack of jurisdiction over its person was sustained and the complaint was dismissed as to it, from which the complainant appealed. The Court, in dismissing the appeal, said:

> "So far as appears from the record the suit is still pending and undetermined as against the codefendants of the company. We are of the opinion, therefore, that this appeal can not be maintained because the decree rendered in favor of the company was not a final decree."

The *Arnold case* involves an action by a subcontractor on a contractor's bond under the Materialmen's Act. Recovery

was allowed by the courts as to this subcontractor, but the case was remanded for the bond money to be held by a master until other interested subcontractors could enter any claims which they might have against the surety money. Although liability was final as to the claim of the complaining subcontractor, this Honorable Court, in refusing an appeal, said:

> "It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be reviewable, a judgment or decree must be not only final, but complete; that is, final not only as to all the parties, but as to the whole subject matter and as to all the causes of action involved; and that if the judgment or decree be not thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction."

Our Fifth Circuit followed the Supreme Court's holdings in the *Hohorst* and *Arnold cases* in its holding in *Hunteman v. New Orleans Pub. Serv. Inc., et al., 119 F. 2d 465, cert. den., 314 U. S. 647.* This was an action against joint tort feasors which alleged joint and concurrent negligence and asked for a judgment in solido against them. The action was dismissed as to one of them on the ground that the company failed to state a claim upon which relief could be granted, and the Fifth Circuit dismissed the appeal, holding that there was but one claim for determination between the parties, and as this claim was still pending as to some of them, there was no final judgment from which an appeal would lie.

Let us consider the case at bar in the light of the above authorities. This is an action against several defendants,

jointly and severally, for alleged conspiracy in violation of the Sherman and Clayton Acts. The orders of March 14, 1949 (R. 328-329), quashed the service and dismissed the action as to Respondent Southwestern Development Company and other respondents, leaving petitioners' alleged cause of action still pending against Defendant Canadian River Gas Company in the United States District Court for the Northern District of Texas. Thus we have plaintiffs suing jointly and severally six defendants, and orders of the court dismissing some of the defendants but not all of them. Applying the *Arnold* and *Hohorst cases* to our facts, we have but one claim for determination between the parties: the original case has only been split, and the United States District Court for the Northern District of Texas has jurisdiction as to a part of it; so there is not a final judgment which is appealable.

Petitioners, in their brief in support of their petition for writ of certiorari (pp. 54-64), find no fault with this Honorable Court's holdings in the *Arnold* and *Hohorst cases*, nor with the holding of the Court of Appeals for the Fifth Circuit in the *Hunteman case*, but say they are not applicable here, as this is an action for joint and several liability, whereas the *Hohorst*, *Arnold* and *Hunteman cases* were for joint liability only. In this, petitioners are in error, as the *Hohorst case* was an action for joint and several liability based on patent infringement; the *Arnold case* was for joint and several liability against a contractor and his surety; and the *Hunteman case* was for joint and several liability against joint tort feasors in which a judgment *in solido* against all of the tort feasors

was sought. Apparently petitioners failed to take into account the meaning of the term, "in solido". "In solido" is a term taken from the civil law, and is synonymous with "joint and several". *Henderson v. Wadsworth, 115 U. S. 264; George T. Bishop, Inc. v. Jones, 17 La. App. 410, 136 So. 101; Rusca & Cunningham v. Hammett (La. App.), 195 So. 642.*

Although petitioners failed to realize the significance of the term, "in solido", the United States Court of Appeals for the Fifth Circuit did realize such significance when it entered its judgment in this action dismissing the appeal, in which it said:

> "It is further ordered and adjudged that the appellants, Floyd W. Dunaway, and others, and the surety on the appeal bond herein, American Surety Company of New York, be condemned, *in solido* (emphasis ours), to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court." (R. 383.)

Thus it is seen that the *Hohorst, Arnold* and *Hunteman cases* apply to joint and several liability, and not merely joint liability as contended by petitioners. It is a fact that the *Hunteman case* was decided under Section 225 of Title 28 of the United States Code, and that this section has been amended by Sections 1291-1294 of Title 28; but this amendment did not change the meaning of said Section 225 or the jurisdiction conferred upon the courts of appeal as to appealable orders.

Under the authorities cited, it is submitted that the order dismissing the action as to Respondent Southwestern De-

velopment Company is not one from which an appeal may be taken under Sections 1291 and 1292 of Title 28 of the United States Code, and the United States Court of Appeals for the Fifth Circuit was correct in dismissing petitioners' appeal.

CONCLUSION

It is therefore respectfully submitted that this case is not a proper one for review by certiorari, and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

Wales H. Madd

WALES H. MADDEN,
903 Fisk Building,
Amarillo, Texas.

PAUL A. MCDERMOTT,
Fair Building,
Fort Worth, Texas,
Attorneys for Respondent, Southwestern Development Company.

I, Wales H. Madden, attorney for the Respondent Southwestern Development Company, do certify that a copy of the foregoing reply was mailed to Arthur H. Bartelt, Post Office Box 190, Austin, Texas, attorney for petitioners, in a properly stamped and addressed envelope this the 11 day of May, 1950.

Wales H. Madden